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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 305.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, a corporation, *Petitioner,*

against

BENNETT F. SCHAUFFLER,
individually and as Regional Director for the 5th Region
National Labor Relations Board, and as the National Labor Relations Board.

JACOB BLUM,
individually and as Regional Attorney for the 5th Region
National Labor Relations Board, and as the National Labor Relations Board; and
The Trial Examiner of the National Labor Relations Board designated or to be designated by the National Labor Relations Board, who is now unknown, individually and as such Trial Examiner and as the National Labor Relations Board, *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER

We respectfully invite attention to the following reply to the Respondents' brief:

This Case Disposed Of On Motion To Dismiss. Lack of Jurisdiction In National Labor Relations Board Admitted By Respondents.

In none of the cases cited by Respondents on the question of enjoining action by an administrative agency, did the agency in question move to dismiss a complaint alleging facts showing want of jurisdiction, and thereby admit, as Respondents admitted in the instant case, that the agency was without jurisdiction.

At page 13 of Respondents' brief they say that in a number of cases in which this Court has refused to interfere with administrative action, it was contended, as in this case, that the administrative body was acting outside its jurisdiction. They cite four cases:

Dalton Adding Machine Co. v. *State Corporation Commission,* 236 U. S. 699

St. Louis-San Francisco Ry. Co. v. *Alabama Public Service Commission,* 279 U. S. 560

Lawrence v. *St. Louis-San Francisco Ry. Co.,* 274 U. S. 588

Federal Trade Commission v. *Claire Furnace Co.,* 274 U. S. 160.

The first three were attempts to enjoin action by State Administrative agencies. The question of comity as between Federal and State governments was present as in *Prentis* v. *Atlantic Coast Line R. Co., et al,* 211 U. S. 210. In only one of the four were the rights or interests of the complainant in jeopardy; and in that case, notwithstanding a state agency

was involved, this Court continued a previously granted restraining order.

Thus, in *St. Louis-San Francisco Ry. Co.* v. *Alabama Public Service Commission,* in which a three judge court had denied an application for an interlocutory injunction, this Court, while holding that permission to discontinue the train service in question should have been sought from the Commission, nevertheless vacated the decree denying the interlocutory injunction and continued in force a restraining order previously granted restraining the Commission from imposing penalties.

Dalton, etc., Co. v. *State Corporation Commission* concerned the assessment of a license tax, which was recoverable if paid under protest.

In *Lawrence* v. *St. Louis-San Francisco Ry. Co.,* the decree awarding a temporary injunction was reversed, not because it was improper to enjoin action by an administrative body, but, in the language of Mr. Justice Brandeis:

> "because the verified bill and the affidavits fail to supply that evidence of danger of irreparable injury to plaintiff which is essential to justify issuance of a temporary injunction. Indeed, it appears affirmatively from the allegations of the bill and the facts testified to in the affidavits that irreparable injury would not have resulted from the failure to issue a restraining order, etc."

In the *Claire Furnace Case* the Federal Trade Commission was seeking to gather and compile information relating to certain corporations engaged in commerce. It had merely served notice pursuant

to Section 6 of the Trade Commisison Act, requiring the giving of information. No penalties could be enforced for failure to supply the information called for, nor any action taken to compel the furnishing of such information, until the propriety and legality of the requisition had been passed upon by the Attorney General. In the event he deemed action proper, he was required to institute a proceeding in the District Court. As Mr. Chief Justice Taft said:

> "Until the Attorney General acts, the defendants cannot suffer and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them."

The right to a judicial determination of all questions affecting the validity of the order was preserved by the act; and that determination was to be had in an independent proceeding in the District Court *before* any mischief had occurred or could occur.*

Here is no authority for the view that an administrative body, acting admittedly beyond its jurisdiction, may not be enjoined on a proper showing of irreparable injury.

There was, in that case, no admission, as in this, that the administrative body was without jurisdiction.

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*Respondents' statement at page 4 of their brief that "The company filed no answer to the Board's complaint" is not correct. After serving on Respondents copies of its bill in this case with notice of the intention to file the same on a date stated, and before the hearing by the Trial Examiner, Petitioner appeared specially in the proceeding instituted by the Board, and, pursuant to such special appearance, filed an answer in which Petitioner expressly denied the jurisdiction of the Board and reserved all of its constitutional rights, and declined to submit the question of jurisdiction or any other of its constitutional rights to the determination of said Board.

When Respondents moved to dismiss the bill in this case they admitted all of the pertinent facts alleged therein.

Street v. *Lincoln Safe Deposit Co.*, 254 U. S. 88.

They thereby admitted that the National Labor Relations Board has no jurisdiction of Petitioner or its business. There was, then, *quoad* this case, no question of the Board's jurisdiction left for it to decide.

This would have been true even if the bill had confined itself to a description of Petitioner's business and omitted altogether the averments of Art. 24 (R. 17). Of the latter Respondents in a footnote at page 11 of their brief say:

> "Petitioner assumes that the allegations in its bill that its relations with its employees do not directly affect interstate commerce (R. 17) are admitted by the motion to dismiss. These statements are clearly conclusions of law, and accordingly not admitted."

They cite:

> *Pennie* v. *Reis*, 132 U. S. 464, 469-470
> *Pierce Oil Corp.*, v. *Hope*, 248 U. S. 498-500.
> *Nortz* v. *U. S.*, 294 U. S. 317, 324-325

The cases cited involve conclusions of law pure and simple.

The holdings were:

> *Pennie* v. *Reis:*
> "If the pleading misstates the effect and purpose of the statute upon which the party relies, the adverse party in demurring to such

pleading does not admit the correctness of the construction, or that the statute imposes the obligation or confers the rights which the party alleges."

Pierce Oil Corp. v. *Hope:*

Demurrer to bill to enjoin enforcement of municipal ordinance does not admit an allegation that such ordinance is *unnecessary* and *unreasonable.*

Nortz v. *U. S.:*

"Defendant's demurrer, which admitted facts well pleaded in the petition, did not admit the allegations which amounted to conclusions of law in relation to the gold certificates or the legal effect of the legislation under which they were issued, held or to be redeemed."

These cases have no application here.

The allegations of Art. 24 (R. 17) to the effect that Petitioner's activities and its relations with its employees do not directly affect interstate or foreign commerce nor burden or obstruct the same or the free flow thereof, and have not led or tended to lead to labor disputes burdening or obstructing such commerce; are all allegations of fact, fully susceptible of proof, and would have been proved but for the interposition of the motion to dismiss.

That the relations between Petitioner and its employees have not led or tended to lead to labor disputes, is a fact so notorious that the District Court said it might well take judicial notice of it. (R. 91).

That these relations are and have continuously been harmonious is alleged not only here, but else-

where in the bill (Art. 15, R. 11 and 12; Art. 17, R. 12, and Exhibit C. R. 61). If there are and have been no labor disputes of any kind at Petitioner's plant, as Respondents admit by their motion to dismiss, there certainly have been none affecting commerce. Moreover, the bill describes in detail the Petitioner's activities, and shows that they are purely local, and have no direct and substantial effect upon commerce. This is admitted by the motion to dismiss.*

The Act Does Not Purport to Deprive Federal Courts of Equity of Their Power to Pass Upon Questions of Constitutional Right and Prevent Irreparable Injury.

Respondents argue that the National Labor Relations Act bars relief in equity by vesting exclusive jurisdiction in the Board and the Circuit Court of Appeals. This claim of exclusive jurisdiction rests upon an obvious distortion of the statute. The Board is by Section 10 (a) given power "to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce; and this power is made exclusive. The only exclusive power

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*The foot note on page ten of Respondent's brief states that Petitioner has not assigned as error the failure of the Circuit Court of Appeals to grant an injunction **pendente lite**; and that therefore the sole question before this Court is "whether the District Court erred in dismissing the bill." They profess to think the request in Petitioner's brief that the District Court be directed to grant an injunction **pendente lite** is not permissible on the errors assigned. In this they are hypertechnical. The dismissal of the bill was all-embracing. Moreover, they are mistaken in their premises. Of the "specification of errors to be urged" contained in Petitioner's brief, the seventh (p. 10) is that the Circuit Court of Appeals erred "in affirming the Decree of the District Court". The decree of the District Court, both denied the motion for an injunction **pendente lite**, and dismissed the bill. (R. 96).

given to the Board is the power to prevent unfair labor practice *affecting commerce.* The exclusive jurisdiction conferred upon the Circuit Court of Appeals is confined to a review of the Board's action within the confines of its statutory authority.

The Act does not purport to deprive the District Courts of their ordinary equity powers in cases where proposed action by the Board threatens the invasion of constitutional rights. If it did, it would violate the Fifth Amendment as a taking of property without due process of law.

Respondents' argument proves too much. It claims for the Board the power to subject all business* to more or less protracted hearings on charges of unfair labor practices. Counsel say:

> "If the Board should find on the record made in the hearing before it that an employer was not subject to its jurisdiction because not engaged in commerce * * * the pending complaint would be dismissed and the employer relieved from *further proceedings.*" (Italics supplied)

The record before the Board is the record made before the Trial Examiner. (Section 16 Rules and Regulations, R. 36). Hearings before the Trial Examiner may last for weeks and even months. A prompt dismissal for want of jurisdiction is not feasible, and does not occur in practice. Respondents' argument therefore comes to this: Every employer in the United

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*Under Section 2, sub. 2, the United States, States and political subdivision thereof and persons subject to the Railway Labor Act, and labor organizations are excluded.

States may, on complaint filed with a Regional Director, and without any preliminary investigation as to the character of his business*, be haled before a Trial Examiner on charges of unfair labor practice, with no possibility of a judicial determination of the Board's jurisdiction, until after protracted hearing involving expenses that can in no event be recovered. Counsel say resort to Courts of Equity for a determination of this fundamental question would be "productive of intolerable delay."

We are not disposed to weigh the inconvenience that may result to the Board from a slowing down of its tempo, against the baleful consequences of a general paralysis of business. For precisely this may be expected, if the business concerns operating within the vast domain over which Congress has no constitutional control, can claim no immunity from the procedure prescribed by this Act; if, when proceeded against by the Board, they must submit to a long and highly expensive investigation, with no opportunity to obtain a judicial determination of their constitutional rights until after the mischief has been, in large

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*Here the practice is widely different from that of the Federal Trade Commission under Section 5 of the Trade Commission Act. Under that section there are two important pre-requisites to the filing of a complaint. (1) The Commission must have reason to believe that the person or corporation in question is using unfair methods of competition in commerce. (2) It must appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.

Here is no authority to a Regional Agent or Director to file complaints in his uncontrolled discretion, whenever a charge is presented to him. Nor can the Commission itself institute such proceeding, without preliminary inquiry sufficient to satisfy it as to the two prime requisites mentioned above.

The assertion of Counsel that the procedure under this Act is substantially identical with that under Section 5 of the Trade Commission Act is quite inaccurate.

part, consummated. This is the fundamental question involved in this case. We are here dealing with constitutional rights. This Court, though generally reluctant to interfere with the proceedings of administrative bodies, has, nevertheless, recognized that where rights are likely to be violated or damages suffered in the meantime, even State Agencies may and should be restrained.

St. Louis-San Francisco Ry. Co. v. *Alabama Pub. Service Com., supra.*

It has also recognized the vital distinction between mere questions of the manner in which such administrative agencies perform their duty *within* their legitimate spheres, and questions going to their *jurisdiction* to act at all in the matter involved.

Thus in *Crowell* v. *Benson,* 285 U. S. 22, cited in our main brief, it was said in the majority opinion (at pp. 54-55):

> "What has been said thus far relates to the determination of claims of employees within the purview of the act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (section 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions."

Again at pages 56-57:

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions" * * *
>
> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of facts by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

And at page 65:

> "It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere."

And in *St. Joseph Stockyards Co.* v. *United States,* 298 U. S. 38, this Court said at page 52:

> "Under our system there is no warrant for the view that the judicial power of a com-

petent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The Respondents here claim for the Labor Board the right and power to act "beyond the limits of Constitutional authority." To accomplish this they would "circumscribe" the judicial power of a competent Court. In their broad claim of the right to subject all business, regardless of its nature, to the burdens of defending charges of unfair labor practice, they presume upon the reluctance of Courts to interfere with the action of administrative bodies. *But that doctrine is applied only where it is apparent that no harm can be suffered if the administrative agency is permitted to proceed within the limits of its lawful authority.* And always the doctrine yields to the requirements of justice. If it be shown that penalties will be incurred, or other damages suffered before the constitutional rights of a party can be judicially determined, the administrative body, even though a state agency, will be restrained.

St. Louis-San Francisco Ry. Co. v. *Alabama Public Service Commission, supra.*

That petitioner will suffer substantial and irreparable injury, before any judicial determination of the jurisdictional question can be had, if the statutory procedure is followed, is clear from the record:

> "Of course, in a court of equity, when passing upon the right of injunction, damage threatened, irremediable by action at law, is equivalent to damage done."

Hitchman Coal & Coke Co. v. *Mitchell,* 245 U. S., at p. 256.

It is also clear that that procedure was not intended to apply, and cannot, without violation of the constitution, be applied to any employer whose activities do not burden or obstruct commerce. The bold avowal of representatives of the Labor Board of its purpose to apply it universally, demonstrates the need of leaving Courts of Equity free to exercise their normal functions, and to grant injunctive relief where, as in this case, it is admitted that the Board is without authority to deal with the relations between the complainant and his employees, and is merely exercising its *assumed* right to subject all business to the burden of defending unauthorized proceedings.

Such an injunction is the most effective, if not the only, means of confining the Board within its lawful bounds—certainly the only means of preventing serious injury and large irrecoverable expense before a judicial determination of the question of jurisdiction can be had, if the accused must follow the statutory procedure.

As was said in *Crowell & Benson, supra*, to confine the Board to its proper sphere "cannot be regarded as an impairment" of its intended efficiency.

Very respectfully submitted,

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